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IN THE

Supreme Court of the United States

October Term, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,
Petitioners,

vs.

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,
Respondents.

Brief on Behalf of Respondents Fio Rito and Seeger in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented

In an action pending since August, 1962, in which substantial discovery had taken place, including 1000 pages of deposition and hundreds of documents marked for identification, when the case appeared on the review calendar for the third time pursuant to Rule 23 of the General Rules for the Southern and Eastern Districts of New York, upon plaintiff's application for a further adjournment a 60-day order issued, requiring that plaintiffs file a note of issue by August 17, 1964, or the action "may be dismissed without

further notice, for want of prosecution". Plaintiffs contend that no notice of this order was given, but counsel for one of the defendants produced in the Court of Appeals, a notice of the entry of the said order, received by mail from the clerk of the court. On August 21, 1964, an order was entered dismissing the action "for lack of prosecution, without prejudice and without costs". No party or counsel was aware of the entry of this order, since it was without notice pursuant to the order of June 8. The only action taken after the 60-day order of June 8, 1964, was the noticing of a deposition August 14, more than 60 days later, its taking October 24, 1964, and signing December 24, 1964. Plaintiffs first learned of the order of August 21, 1964, dismissing the action, more than a year later, on September 17, 1965, and moved to vacate the same under Rule 60(b)(6) of the Federal Rules of Civil Procedure. In the exercise of discretion the District Court denied plaintiffs' motion, upon findings, *inter alia*, that "plaintiffs have submitted no affidavit of merit. The lengthy affidavit submitted by counsel is not persuasive", and that "no just reason exists for vacating the order of dismissal". Plaintiffs' motion for reargument was similarly denied, upon additional findings, *inter alia*, that "the action was not up to the time of dismissal or thereafter diligently prosecuted" and that "no legal proceedings were pursued and no depositions were taken since December, 1964". The Court of Appeals unanimously affirmed. The questions presented are:

1. Whether it was an abuse of discretion for the District Court to dismiss the action for lack of prosecution without prejudice and without costs, on August 21, 1965, without notice, pursuant to the 60-day order of June 8, 1964, entered upon plaintiffs' application for a further adjournment when the case appeared on the review calendar for the third time after two previous adjournments.

2. Whether it was an abuse of discretion for the district court to deny plaintiffs' motion, made more than one year after said dismissal, under Rule 60 (b) 6, to vacate the order of dismissal, and their motion for reargument, upon findings that the action was without merit, and was not diligently prosecuted.

Statement

While the petitioners (plaintiffs) contend that this is a very complicated action under Section 10(b) of the Securities and Exchange Act of 1934, it is really nothing more than a strike action seeking astronomical money damages based upon fictitious claims of common law fraud and duress.

Plaintiffs, as incorporators and founders of defendant Coraloc Industries, Inc. (Coraloc) had received certain stock and options of the said corporation at the time that it "went public". Thereafter, when Coraloc was in financial difficulties, an agreement was made in July, 1960, with defendant E. L. Bruce Company Incorporated (Bruce) (then Empire Millwork Corporation) whereunder Bruce provided financing for Coraloc, became the national distributor of its swimming pools and obtained an option to acquire 67% of its capital stock at an agreed price. As security for Coraloc's performance in the event of the exercise of the option, there were deposited in escrow with Miller & Seeger, Esqs., as attorneys for Coraloc, all of the authorized and unissued Coraloc shares, and by agreement among the principals themselves, a portion of the stock and options theretofore held by plaintiffs Graham and West and defendant Fio Rito, sufficient to make up the required dif-

ference.[1] The business of Coraloc did not flourish and the said shares and options thus held in escrow were virtually worthless, unless Bruce were to exercise its option under the aforesaid agreement (72a, 73a).* In May, 1961, in anticipation of the exercise of its said option, Bruce acquired all of the remaining Coraloc stock and options held by the plaintiffs outside of the escrow, and by their relatives and friends, all at a substantial profit to the sellers (65a). No shares or options held by defendant Fio Rito were acquired by Bruce at that time and Bruce did not exercise its option under the aforesaid agreement, despite assurances from defendant Gilbert, Bruce's president, that it was going to do so. Defendant Gilbert then promised defendant Fio Rito that when Bruce finally exercised its option, it would also take over his shares and options held outside the escrow in a share for share exchange for Bruce stock (73a). Thereafter, on numerous occasions, each of the plaintiffs made independent overtures to defendant Gilbert in an effort to persuade Bruce to acquire his interest in the shares and options held in escrow (70a).

On April 6, 1962, negotiations which had been going on for some time between plaintiffs and defendant Bruce, culminated in an agreement for the sale by plaintiffs to Bruce of their respective interests in the stock and options held in the aforesaid escrow, for a total sum of $51,000.00. Plaintiffs were fully apprised during the negotiations, of a pending deal whereunder Coraloc was seeking, with the aid of Bruce, to acquire the stock of Sunset Pools, Inc. They were told by defendant DeSousa, who represented

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[1] Contrary to the allegation on page 4 of petitioners' brief, the California Corporation Commission never passed upon the escrow agreement of July 15, 1960. Consequently, it never approved the same and never imposed any requirement thereon (75a).*

* All page references are to the Appendix to Appellants' Brief in the Court of Appeals refiled herein.

Bruce in the negotiations, that while the deal contemplated the exercise by Bruce of its option under the aforesaid agreement, the deal would not be consummated in that form so long as the plaintiffs, who had contributed little to the corporation, remained stockholders of Coraloc. It was self-evident at the time that the exercise of the Bruce option would improve the position of defendants Fio Rito and Seeger, who were the beneficial owners of the bulk of the stock and options remaining in escrow. Plaintiffs requested that defendants Fio Rito and Seeger give up part of their options to plaintiffs as a condition of their acceptance of the Bruce offer. Fio Rito and Seeger refused to do so, and Seeger advised plaintiffs that any benefits that might accrue to him and Fio Rito were well deserved since it was as a result of their efforts that plaintiffs and their relatives and friends had derived profits from their Coraloc stock and options. He also told plaintiffs that they could reject the Bruce offer and retain their stock and options and take their chances along with him and Fio Rito. Without pressure or duress of any kind, plaintiffs elected to accept the Bruce offer for the sale of their stock and options, and as part of the consideration for the payment received, plaintiffs executed general releases to all of the defendants except DeSousa, after a clear explanation of the purpose and effect of the said releases (13a, 71a, 72a).

After the acquisition of plaintiffs' stock and options on April 6, 1962, Bruce exercised its option to purchase 48,425 shares of Coraloc stock at $5.00 per share. This acquisition gave Bruce the requisite control over Coraloc to permit the sale by Sunset Pools, Inc. of its stock to Coraloc, in exchange for Bruce stock, as a tax free exchange. Bruce did not then purchase the stock and options of Fio Rito and Seeger, et al., although it was their belief at the time that the exercise of the option to acquire the 48,425 shares of stock constituted an exercise of the option to acquire

their interest as well. There was no secret deal. Their contention was based entirely upon the provision of the agreement of July, 1960, between Empire (Bruce) and Coraloc, the terms of which were well known to plaintiffs. At a meeting with defendant Gilbert, then President of Bruce, that afternoon, he acknowledged Bruce's obligation to purchase the remaining options in escrow, without fixing a time for the consummation of the purchase, and reaffirmed his wholly independent promise to Fio Rito to acquire his personally held stock and options in a share for share exchange for Bruce stock. There was nothing sinister or secretive about this. The plaintiffs, by their own admission, knew since December, 1960, that Fio Rito held stock and options outside the escrow and they themselves had, in May 1961, as above noted, sold their personally held stock and options to Bruce for a cash consideration (65a, 73a, 74a).

After the resignation of defendant Gilbert as President of Bruce, in June, 1962, the Bruce people let it be known that they were going out of the swimming pool business. Thereupon, defendant Fio Rito and Seeger entered into negotiations with Bruce for the sale of their stock and options based upon the aforestated contention that Bruce was contractually obligated to purchase the same by reason of the exercise of its option on April 6, 1962. The demand was for the option price of $19.00 per share. Settlement was made in part for Bruce shares at a declared value of $12.60 per share, which were ultimately sold at $7.00 per share (74a, 75a). It was at the time of the consummation of the latter sale that plaintiffs made their application for a temporary injunction. In denying plaintiffs a preliminary injunction, Judge Weinfeld said:

> "In order to prevail in this motion there must be a showing of a meritorious claim, probable likelihood of success and an equitable basis for the

> exercise of the Court's equity power. While there is some evidential support for plaintiff's claim, there is sufficient countervailing evidence to bring the scales back into balance, so that upon the papers here presented a strong probability of plaintiff's success does not emerge'' (56a).

This case was called on the review calendar several times and was adjourned each time, until an order was entered upon plaintiffs' application for a further adjournment, on June 8, 1964, which

> "Ordered that the plaintiffs shall file a note of issue for trial or take other action to obtain a determination of the above entitled action by August 17, 1964'' and further
>
> "Ordered that if such action is not taken within the said period, the above entitled action may be dismissed without further notice, for want of prosecution, without costs'' (84a, 85a, 100a).

Pursuant thereto, upon plaintiffs' failure to take any action thereon, the action was dismissed by order of the Court on August 21, 1964. A notification card recently discovered in the file of Webster, Sheffield, Fleischmann, Hitchcock & Chrystie, attorneys for defendants Bruce and Coraloc, confirms notice to the parties hereto of the order of June 8, 1964. No notice of the order of dismissal of August 21, 1964, was received by counsel since none was required by the plain terms of the order of June 8, 1964.

Notwithstanding the foregoing, plaintiffs by their own admission took no steps to file a note of issue until September 17, 1965, more than one year after the action had been dismissed (34a, 84a, 85a), and almost eleven months after the last deposition had been taken on October 27, 1964, pursuant to notice filed August 14, 1964 (90a).

Reasons for Denying the Writ

No substantial grounds for the granting of certiorari are to be found in the petition herein, in which the principal reliance is upon petitioners' presentation of their own version of the particular facts of the case. There is no real or apparent conflict between the decision of the Court of Appeals herein and any decision of this Court or of the Court of Appeals of any other circuit. The petitioners herein, in fact seek nothing more than to have this august body review a decision of the district court, which was unanimously affirmed by the Court of Appeals. That decision involved the exercise of a sound discretion by the district court, in denying plaintiffs' motion to vacate the order dismissing their action for lack of prosecution, without prejudice. Manifestly, no important question of law is presented in the petition to warrant the consideration of this Court.

Argument

1. Petitioners claim a conflict between the decision of the Court of Appeals in the case at bar and the recent decision of this Court in *Surowitz* v. *Hilton Hotels Corporation,* 383 U. S. 363. The alleged conflict does not in fact exist. There is no true similarity between the cases. The most significant difference between them lies in the fact that *Surowitz* was dismissed for lack of a proper verification, "with prejudice", while the case at bar was dismissed for lack of prosecution, "without prejudice".

In *Surowitz* this Court held that Rule 23(b) of the Federal Rules of Civil Procedure, does not require the dismissal of a stockholders' derivative complaint, verified by an uneducated woman, illiterate in economic matters, where grave charges of fraud were shown by the record

to be based upon reasonable beliefs growing out of careful investigation, and where over a period of three years, not one of the defendants had ever been compelled to admit or deny the wrongdoing charged.

The case at bar is clearly not a derivative action in form or substance. Plaintiffs' claim that their complaint, like that in *Surowitz,* had been verified pursuant to Rule 23(b), is obviously incorrect, since that Rule is specifically limited to shareholder suits which are derivative (secondary) in nature (Moore's Federal Practice, Second Edition, Vol. 3, p. 3506).

In this case, all of the defendants had answered, and specifically denied all of the plaintiffs' charges. In addition, extensive depositions were taken, including those of both plaintiffs and the defendant Gilbert, with approximately 1000 pages of testimony, and hundreds of documents marked for identification. The record clearly shows that the allegations of fraud in the complaint are wholly fictitious and without foundation in fact, and, indeed, were directly refuted for the most part by the sworn testimony of the plaintiffs themselves (63a through 70a). Lengthy affidavits were submitted on plaintiffs' motion for a temporary injunction, which was denied upon the court's finding that "upon the papers a strong probability of success does not emerge". Equally lengthy affidavits were submitted upon the motion to vacate the order of dismissal, which was also denied upon the court's finding, in part, that "plaintiffs have submitted no affidavits of merit. The lengthy affidavit submitted by counsel is not persuasive".

In the case at bar, plaintiffs are two of the original promoters of Coraloc Industries, Inc. After protracted negotiations, they sold all of their promotional stock and options, out of escrow, to E. L. Bruce Company, Incorpo-

rated, at a very substantial profit, albeit at a figure lower than the option price established by the Empire (Bruce)-Coraloc agreement of July 1960. Although they had with full knowledge of all the facts executed releases to all of the defendants, at that time, plaintiffs thereafter brought this action, seeking astronomical damages, for the alleged fraud of the defendants in the said sale, based solely on the fact that defendant Fio Rito had, some months later, received a better price, albeit not more than the option price, for his stock and options, after Bruce had, in fact, exercised its option under the aforesaid contract. Unlike *Surowitz,* the record herein reveals this case to have all the earmarks of a strike suit.

2. Petitioners urge that the decision of the Court of Appeals herein is in conflict with the decision of this Court in the case of *Hill* v. *Hawes* (1944), 320 U. S. 520. Actually the two cases are perfectly consistent. In *Hill* this court affirmed the action of the district court judge in vacating a judgment, in the exercise of a sound discretion, while the same was within his control. In this case the Court of Appeals has affirmed the action of the district court judge in denying, in the exercise of a sound discretion, plaintiffs' motion to vacate the order of dismissal.

It is noteworthy that Rule 77(d) relied on by petitioners herein, was amended by the Congress in 1946, to avoid just such situations as occurred in *Hill* v. *Hawes, supra.* The *1946 Committee Note to Amended Subdivision (d),* states in part as follows:

> "Rule 77 (d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry

of judgment and not from the date of notice of the entry. *Notification by the clerk is merely for the convenience of litigants.* And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73(a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment." (Emphasis supplied.)

Moore's Federal Practice, Second Edition, Vol. 7, pages 4003, 4004.

The legislature having amended Rule 77, to preclude the enlargement of the thirty-day time to appeal on the basis of lack of notice of entry of judgment, in order to insure the finality of judgments, can certainly not have intended that a judgment of dismissal should be invalidated by the absence of notice or even that the one year statute of limitations of Rule 60(b) should be thereby extended.

3. Petitioners contend that the decision of the Court of Appeals herein is inconsistent with its own decision in *Radak* v. *Norwegian America Line Agency, Inc.,* 318 F. 2d 538 (2d Cir., 1963). Here, too, it is clear that the two cases are completely consistent. In *Radak,* as in the case at bar, the Court of Appeals held that the district judge had the power, in the exercise of a sound discretion, to grant or deny relief under Rule 60(b)(6), in a case where no notice

of the entry of the order of dismissal was sent. The Court itself distinguished this case from *Radak*, in its finding that the order of June 8, was in fact noticed. (Appendix B, page 58 of the Petition.) Furthermore, in *Radak*, at pages 542 and 543, the Court said:

> "We do not mean to suggest that the granting of relief under Rule 60(b)(6) is proper in all cases where notice of the entry of judgment is not sent to one of the parties; lack of notice does not *ipso facto* mean that a judgment must, can or should be reopened. * * * The rule is still subject to both the reasonable time limitation and to the proper exercise of discretion by the district court considering all of the circumstances present in a given case."

In affirming the action of the district judge, in the instant case, the Court of Appeals found no abuse of discretion by the district judge, and after noting the lack of activity in the case after June 8, 1964, said:

> "Even if notices had gone out, the long delay in moving the case to trial after it had three times appeared on review calendars would justify dismissal." (Appendix B, p. 58 of the Petition).

4. The alleged conflict between the decision of the Court of Appeals herein, and the Third Circuit decision in *Tozer* v. *Charles A. Krause Milling Co.*, 189 F. 2d 242 (3rd Cir. 1951), does not exist. In both cases the Courts recognized that the granting of relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, rests in the sound discretion of the district judge which should not be disturbed unless there has been an abuse of such discretion. In *Tozer* the Court held that the finding of the district court that the defendant did not present a meritorious defense, was erroneous, and that the failure to set aside the default

judgment constituted an abuse of discretion. In the case at bar, the Court of Appeals affirmed the action of the district court in denying the motion to vacate the order of dismissal on the finding that the plaintiffs failed to present a meritorious cause of action, and held that there was no abuse of discretion.

Notwithstanding the finding by the district judge of lack of merit in the plaintiffs' cause, and the unanimous affirmance thereof by the Court of Appeals, petitioners have devoted by far the greatest portion of their petition to a repetition of selected portions of the testimony from the record filed herein. We do not wish to burden this Court with a restatement herein of the detailed recitals of the Seeger affidavit (62a through 76a), but we beg the indulgence of the Court for a brief reference to a portion of the evidence contained therein, which completely demolishes the principal charges of fraud in plaintiffs' complaint.

Paragraph "Nineteenth" of the complaint charged Fio Rito and Seeger with fraud and conspiracy based on alleged false representations to plaintiff "that all of the stockholders of defendant Coraloc Industries, Inc., including defendant William A. Fio Rito, were placing all of their Coraloc shares and options in escrow" (43a). As is clearly demonstrated in the Seeger affidavit (63a to 66a)* no such representation was ever made; neither of the plaintiffs deposited all of his shares and options in escrow; their friends and relatives didn't deposit any; they knew the total number of shares required to be deposited by the Empire (Bruce)-Coraloc agreement; and they knew that Fio Rito did not deposit all of his shares and options.

The secondary charge in the same paragraph that defendants had falsely represented that the shares and options of all the stockholders "would be acquired on an

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*Reference on p. 66a to paragraph "18" of the Wels affidavit should read paragraph "10".

equal basis under the said agreement" is absurd on its face. In the first place, there was no such provision in the agreement. Secondly, there could have been no reliance upon any such alleged representation, since the record is clear that plaintiffs and their relatives and friends sold their shares and options held outside the escrow, at substantial profits, in May 1961 (65a), without regard for the fact that Bruce was not buying any of the defendants' securities (15a) and thereafter plaintiffs themselves negotiated with Bruce for the sale of the shares and options which they had deposited in escrow and finally sold the same on April 6, 1962, without regard for the fact that defendants' securities in escrow were not then being purchased (70a).

The charges of fraud in paragraph "Twentieth" of the complaint (43a) are equally without foundation in fact. Therein, defendants are charged with falsely representing to the plaintiffs that it was necessary under the contract for Graham to assign 8,000 of his options to Fio Rito, and that they misappropriated the same to their own use. The testimony of the plaintiffs themselves, quoted in the Seegar affidavit (66a to 70a) clearly shows that no such representation was made or relied on; that Fio Rito had in fact insisted on the assignment of the Graham options, as a condition of his continued efforts on behalf of Coraloc, with the understanding that the benefits thereof were intended to accrue to the benefit of defendant Seeger and others who helped Coraloc while it was in financial difficulties. It is evident, therefore, that there was no fraudulent representation and no misappropriation of Graham's options.

On the basis of the foregoing and the remainder of the Seeger affidavit, as well as the complete record of testimony taken in this case, it becomes apparent that plaintiffs have not and cannot establish a meritorious cause of ac-

tion. Judge Ryan so found. In his opinion (5a) he stated:

> "Plaintiffs have submitted no affidavits of merit, The lengthy affidavit submitted by counsel is not persuasive.
>
> I have read the complaint and the entire court file and particularly the affidavits of defendants and the testimony quoted therein, and Judge Weinfeld's decision denying plaintiffs a preliminary injunction. From this I join in his conclusion that a 'strong probability of plaintiffs' success does not clearly emerge', and that no just reason exists for vacating the order of dismissal."

The absence of a meritorious cause of action precluded the favorable consideration of plaintiffs' prayer for relief under Rule 60(b)(6).

Coclin Tobacco Co., Inc. v. *Brown & Williamson Tobacco Corporation,* 353 F. 2d 727 (CCA 2d, 1965);

7 Moores Federal Practice, 299;

Sebastiano v. *U. S.,* 103 F. Supp. 278, aff'd 195 F. 2d 184 (6th Cir., 1952);

Assman v. *Fleming,* 159 F. 2d 332, 336, 337 (8th Cir., 1947);

U. S. v. *Williams,* 109 F. Supp. 456 (U. S. D. C. W. D. Ark., 1952).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondents Fio Rito and Seeger.